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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

JUN 05 2003

File: WAC-01-277-53923 Office: California Service Center Date:

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, California Service Center, and is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an importer and exporter of furniture, home furnishings and art. It seeks to employ the beneficiary temporarily in the United States as its Chief Executive Officer. The acting director determined that the petitioner had not established that the beneficiary has been employed abroad in a primarily managerial or executive capacity, that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position, or that sufficient physical premises to house the new office had been secured.

On appeal, counsel submits a brief in rebuttal to the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

Title 8 C.F.R. § 214.2 (1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- A) Sufficient physical premises to house the new office have been secured;
- B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The first issue to be addressed is whether the beneficiary has been employed abroad in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The United States petitioner was established in 2001 and states that it is a wholly-owned subsidiary of [REDACTED] located in Stockholm, Sweden. The petitioner declares one employee and a gross annual income of approximately \$800,000. It seeks to employ the beneficiary for a three-year period at a salary of \$1,900 per week. The foreign entity, established in 1992, with a staff of six employees, is involved in the business of import and sale of furniture, home furnishings, rugs, and art works. The beneficiary is currently employed as its chief executive officer and chairman. The remaining five employees consist of a store manager, a CFO and three sales persons.

The petitioner, in response to the Bureau's notice of intent to deny, describes, in pertinent part, the beneficiary's duties abroad as follows:

[The beneficiary's] duties include:

- . Direct the activities of the Sales Department by overseeing the pricing and promotional aspects implemented by the Store Manager through the sales staff. (30-35%)
- . Formulating general supervisory and administrative policies for the company (10-15%)
- . Formulating and overseeing purchasing policies for the company which included negotiations with certain key suppliers (20-25%)
- . Formulating and overseeing financial aspects of policies implemented through the Chief Financial Officer (15-20%)
- . Holding responsibility for hiring and training the sales staff in conjunction and with the cooperation of the sales on new product[s] (10-15%)

The acting director states, in pertinent part, that:

The fact that an individual is listed as the Chief Executive Officer and Chairman does not necessarily establish eligibility for the classification as an intercompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record must conclusively establish that the majority of the beneficiary's duties performed with the foreign entity have been primarily directing the management of the organization. However, judging from counsel's additional description of duties performed abroad and the fact that the foreign entity has only five other employees besides the beneficiary, it is clear that the beneficiary has been performing many aspects of the day-to-day duties required to operate the furniture store.

The acting director further states, in pertinent part, that:

The record contains insufficient evidence to demonstrate that the beneficiary has been primarily employed in a managerial or executive capacity. The record indicates that a preponderance of the beneficiary's duties abroad have been directly providing the services of the business. Counsel's comprehensive description of the beneficiary's duties seem to further demonstrate that the beneficiary has been involved in many of the day-to-day duties involved in the operation of the foreign entity. Additionally, the petitioner's evidence is not persuasive in establishing that the beneficiary has been managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties.

On appeal, counsel states, in pertinent part, that:

The original petition submitted specifically states that [the] beneficiary would coordinate sales promotion activities, supervise employees engaged in sales work, take inventories, reconcile cash with sales receipts, keep operating records, and prepare daily records of transactions for the accountant. Furthermore, the beneficiary would supervise employees engaged in receiving and shipping freight, documentation, assessing changes, collect fees for shipments and conduct general administration affairs. Finally, the beneficiary would be responsible for acting as a liaison and representative for the foreign company, marketing the services of the U.S. company, engaging in long-range planning and identifying business opportunities in both the U.S. as well as the European market, and formulate pricing policies on merchandise according to requirements for

profitability of store operations. Given his various duties, the beneficiary clearly directs the management of the organization and controls the work of other employees, thereby placing him within the "ambit" of those individuals statutorily defined as a manager or executive.

Counsel states that the Bureau has acknowledged that the "beneficiary has significant authority over the organization." Counsel states that the Bureau erred in its decision and that the beneficiary falls within the "ambit" of those individuals statutorily defined as a manager or executive. Counsel further indicates that the beneficiary's duties demonstrate that the beneficiary directs the management of the organization and controls the work of other employees.

The petitioner has described the beneficiary's duties abroad, in pertinent part, as coordinating sales promotion activities, supervising employees engaged in sales work, taking inventories, reconciling cash with sales receipts, maintaining operating records, and preparing daily records of transactions. Such duties, however, do not persuasively demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Without further elaboration, the duties described are simply not sufficient to demonstrate the beneficiary's managerial or executive responsibilities. The record does not clearly reflect that the beneficiary has not been primarily involved in performing the day-to-day functions of the foreign entity. Based on the evidence furnished, it cannot be found that the beneficiary has been employed abroad in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Another issue to be addressed in this proceeding is whether sufficient physical premises to house the new office have been secured.

In his decision, the acting director states, in pertinent part, that:

In support of its claim that it has sufficient physical premises to house the new office, counsel has re-submitted [sic] a copy of an agreement between the beneficiary and Global Business Center (GBC) located at

the service submits that it overlooked this agreement in the original petition. However, it should be noted that the agreement is only a page and a quarter long, does not indicate the total square footage of office and warehouse space, nor does the agreement indicate the monthly fee paid by the petitioner because the petitioner failed to

provide a complete agreement which includes fees as set forth in Addendum A.

On appeal, counsel argues that the Bureau cannot be empowered with such overwhelming authority as to set criteria regarding the length of a rental agreement. A lease agreement of only "a page and a quarter" may not be to the Service's liking, however, Congress has not mandated a set standard to justify such a conclusion."

The record reflects that, on September 13, 2001, the Bureau sent the petitioner a notice of intent to deny the petition. In response to that notice, on October 14, 2001, counsel submitted, among other evidence, a photocopied lease agreement between the petitioner and Global Business Center. The lease was to commence on September 1, 2001 and remain in effect for one month. Therefore, even though the petitioner had a place to conduct business at the time the petition was filed on September 7, 2001, based on the record, by the time counsel responded to the notice of intent to deny, the petitioner had no place to conduct its business in the United States. It is significant that the petitioner does not submit any new evidence indicating that the petitioner has entered into a new leasing agreement or purchased property for the purpose of conducting its business. Therefore, it cannot be concluded that sufficient physical premises to house the new office have been secured. For this additional reason, the petition may not be approved.

The final issue to be addressed in this proceeding is whether the United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner submits initially an undated letter which stated, in pertinent part, that:

The financial picture is quite encouraging. We will be slow to take on debt, but with our increase in sales, we do expect to apply for a credit line with the bank, to a limit of \$350,000. The credit line will easily be supported by assets. We do expect to be able to take some money out as dividends. The owner's don't take overly generous salaries, so some draw is appropriate.

The petitioner submitted a photocopied bank statement dated August 20, 2001, indicating that the United States entity had a bank balance of \$99,980.00. The source of the funds is not disclosed, but the petitioner indicates in other documentation that the beneficiary purchased the United States entity. The record contains no evidence that the foreign entity has made any provisions for providing any financial support during the petitioner's initial year of operation. It is significant that, at \$1,900.00 per week, the beneficiary's annual income will alone exhaust the aforementioned bank funds. Although the petitioner indicates that

a bank loan may be effected, the record contains no evidence of any verified additional income, which could be used as collateral for any loans. It is therefore concluded that the petitioner has not established that the intended U.S. operation, will have sufficient operating funds to do business, support a staff of subordinate employees, or, within one year of approval of the petition, support an executive or managerial position. For this additional reason, the petition may not be approved.

Beyond the decision of the acting director, the record is not persuasive in demonstrating that the beneficiary would be employed in the United States in a primarily managerial or executive capacity as defined at section 101(a)(44) of the Act. Further, the evidence is not persuasive that a qualifying relationship exists between the petitioner and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.